Pengurusan Danaharta Nasional Bhd v Asas Metropolitan Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–110 OF 1998
TENGKU MAIMUN J
27 AUGUST 2009

Contract — Agreement — Facility agreement — Breach — Bank guarantee facility — Availability period — Whether plaintiff and/or banks under obligation to extend availability period — Whether plaintiff and/or banks under an obligation to give notice to first defendant on expiry of bank guarantee facility — Whether guarantors discharged from their obligations under guarantee agreement — Whether any representation made by BSN Merchant that bank guarantee facility will be extended — Whether banks breached terms of facility agreement — Whether first defendant suffered any loss as a result of non-extension of availability period of bank guarantee facility

BSN Merchant Bank Bhd, MBf Finance Bhd and Public Finance Bhd had agreed to grant the first defendant a bank guarantee and a term loan under syndicated facilities agreement. The second and the third defendants executed a guarantee agreement to make payable monies and sum due and payable by the first defendant in the event of the first defendant's default. The availability period of the bank guarantee facility was for six months beginning 18 October 1996. The first defendant had failed to request for the issuance of the bank guarantee during the availability period which expired on 18 April 1997. As for the Term Loan, it was agreed that it shall be repaid by 16 monthly installments. The first defendant breached the facility agreement by defaulting to pay the interest and installment and failed to settle the outstanding sums to date. By a vesting certificate issued pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), all the rights, title and interest of BSN Merchant Bank Bhd have been vested in Pengurusan Danaharta Nasional Berhad ('Danaharta'). Pursuant to a court order dated 14 July 2000, BSN Merchant Bank was substituted by Danaharta as the plaintiff. Pursuant to a vesting order dated 8 January 2001, all assets and liabilities of BSN Merchant Bank were transferred to Affin Bank. The land of the first defendant which was charged as security for the facilities was sold to Arena Flora Sdn Bhd for RM12,000,000. After deducting the costs and expenses in connection with the sale, the proceeds of the sale were credited into the first defendant's account. Vide this suit the plaintiff was claiming against the first defendant the outstanding sum plus interest. The claim against the second and the third defendants was under the guarantee agreement. The first defendant filed a counterclaim against the plaintiff, Affin Bank and BSN Merchant Bank for loss of profits, damages and

expenses due to the failure to provide and make available the bank guarantee to the first defendant. The following issues were raised for the determination of this court: (i) whether the plaintiff and/or the banks are under an obligation to extend the availability period of the bank guarantee facility after 18 April 1997; (ii) whether the plaintiff and/or the banks are under an obligation to give notice to the first defendant that the bank guarantee facility will expire on 18 April 1997; (iii) if so, whether the guarantors are discharged from their obligations under the guarantee agreement; (iv) whether there was any representation made by BSN Merchant that the bank guarantee facility will be extended; (v) whether the Banks have breached the terms of the facility agreement; (vi) whether the first defendant has suffered any loss as a result of non-extension of the availability period of the bank guarantee facility.

Held, allowing the plaintiff's claim with costs; dismissing the counterclaim with costs:

(1) The availability period of the bank guarantee was clearly contained in the terms of the facility agreement. There was no evidence that the first defendant and the lenders have mutually agreed to extend the availability period. What is in evidence was that the first defendant had requested for the period to be extended but the banks/lenders had not agreed to the same. Given the express provision in the facility agreement and the oral and documentary evidence, there was no basis to impose an obligation on the banks to extend the availability period of the bank guarantee after its expiry (see paras 20–21).

(2) As the expiry date of the bank guarantee was already contained in the facility agreement and known to the first defendant as evidenced from its letter seeking extension of the facility, hence, there was no need for the banks to give notice of the expiry of the bank guarantee facility. Further, there was no provision in the facility agreement that required the banks to give such notice of the expiry of the bank guarantee to the first defendant (see para 22).

(3) DW1 had failed to prove the representation on the extension of the availability period of the bank guarantee. Consequently this court finds that there was no breach committed by the banks under the facility agreement (see para 27).

(4) As regards the third defendant, his defence was essentially that his obligation as a guarantor had been discharged due to the failure of the banks to extend the availability period of the bank guarantee. This defence must fail given the finding that the banks were under no obligation to extend the availability period of the bank guarantee (see paras 29–32).

(5) The pleaded defence of the third defendant was premised on the

contention that the banks had failed to make available the bank guarantee facility. It was not premised on the non-service of the notice of demand. In any event it was an agreed fact between the parties that the banks through its solicitors had demanded under the guarantee that the second and third defendants make good the default of the first defendant. In the circumstances, the contention that since no notice of demand was sent to the guarantor hence, absolving him of liability, does not merit consideration (see para 33).

[Bahasa Malaysia summary

BSN Merchant Bank Bhd, MBf Finance Bhd dan Public Finance Bhd bersetuju untuk memberikan kepada defendan pertama jaminan bank dan pinjaman berjangka di bawah perjanjian kemudahan bersindiket. Defendan-defendan kedua dan ketiga menandatangani perjanjian jaminan untuk membayar wang dan jumlah tertunggak dan perlu dibayar oleh defendan pertama jika defendan pertama ingkar. Tempoh kebolehsediaan kemudahan jaminan bank tersebut adalah enam bulan bermula 18 Oktober 1996. Defendan pertama gagal meminta untuk pemberian jaminan bank semasa tempoh kebolehsediaan yang tamat tempoh pada 18 April 1997. Berkaitan dengan pinjaman berjangka, dipersetujui bahawa ia perlu dibayar melalui 16 ansuran bulanan. Defendan pertama memungkiri perjanjian kemudahan tersebut dengan ingkar membayar faedah dan ansuran dan gagal melangsaikan jumlah tertunggak sehingga kini. Melalui sijil perletakhakkan yang dikeluarkan berikutan dengan Akta Pengurusan Danaharta Nasional Berhad 1998 ('Akta'), kesemua hak, hakmilik dan kepentingan BSN Merchant Bank Bhd diletakhakkan dalam Pengurusan Danaharta Nasional Berhad ('Danaharta'). Menurut perintah mahkamah bertarikh 14 Julai 2000, BSN Merchant Bank digantikan dengan Danaharta sebagai plaintif. Berikutan perintah perletakhakkan bertarikh 8 January 2001, kesemua aset dan liabiliti BSN Merchant Bank Bhd dipindahkan kepada Affin Bank. Tanah defendan pertama yang digadai sebagai jaminan untuk kemudahan tersebut dijual kepada Arena Flora Sdn Bhd bagi RM12,000,000. Selepas menolak kos dan perbelanjaan berkaitan dengan jualan tersebut, hasil jualan dimasukkan ke dalam akaun defendan pertama. Melalui guaman ini, plaintif memohon terhadap defendan pertama jumlah tertunggak berserta faedah. Tuntutan terhadap defendan-defendan kedua dan ketiga adalah di bawah perjanjian jaminan. Defendan pertama menuntut balas terhadap plaintif, Affin Bank dan BSN Merchant Bank bagi kerugian keuntungan, ganti rugi dan perbelanjaan disebabkan oleh kegagalan memberikan dan menyediakan jaminan bank kepada defendan pertama. Isu-isu berikut dibangkitkan untuk pertimbangan mahkamah ini: (i) sama ada plaintif dan/atau bank mempunyai tanggungjawab untuk melanjutkan tempoh kebolehsediaan kemudahan jaminan bank selepas 18 April 1997; (ii) sama ada plaintif dan/atau bank mempunyai tanggungjawab untuk memberikan notis kepada defendan pertama bahawa kemudahan jaminan bank akan tamat tempohnya pada 18

April 1997; (iii) jika demikian, sama ada penjamin-penjamin dilepaskan daripada tanggungjawab mereka di bawah perjanjian jaminan; (iv) sama ada representasi dibuat oleh BSN Merchant bahawa kemudahan jaminan bank akan dilanjutkan; dan (v) sama ada defendan pertama mengalami kerugian akibat dari ketidaklanjutan tempoh kebolehsediaan kemudahan jaminan bank.

Diputuskan, membenarkan tuntutan plaintif dengan kos; menolak tuntutan balas dengan kos:

(1) Tempoh kebolehsediaan jaminan bank jelas terkandung di dalam terma-terma perjanjian kemudahan tersebut. Tidak ada keterangan bahawa defendan pertama dan pemberi pinjam bersetuju bersama untuk melanjutkan tempoh kebolehsediaan. Apa yang dalam keterangan adalah bahawa defendan pertama telah memohon untuk tempoh tersebut dilanjutkan tetapi bank/pemberi pinjam tidak bersetuju berbuat demikian. Berasaskan peruntukan jelas di dalam perjanjian kemudahan dan keterangan lisan dan dokumentar, tidak ada asas untuk mempertanggungjawabkan bank melanjutkan tempoh kebolehsediaan jaminan bank selepas tamat tempohnya (lihat perenggan 20–21).

(2) Oleh sebab tarikh tamat jaminan bank telahpun terkandung di dalam perjanjian kemudahan dan dalam pengetahuan defendan seperti yang dibuktikan dalam surat memohon pelanjutan kemudahan tersebut, maka, tidak ada keperluan untuk bank memberikan notis tamat tempoh kemudahan jaminan bank. Selanjutnya, tidak ada peruntukan di dalam perjanjian kemudahan tersebut yang memerlukan bank memberikan notis mengenai tempoh tamat jaminan bank kepada defendan pertama (lihat perenggan 22).

(3) DW1 gagal membuktikan representasi atas pelanjutan tempoh kebolehsediaan jaminan bank. Dengan itu, mahkamah ini mendapati bahawa tidak ada kemungkiran dilakukan oleh bank di bawah perjanjian jaminan tersebut (lihat perenggan 27).

(4) Berkaitan dengan defendan ketiga, pembelaannya adalah bahawa kewajipannya sebagai penjamin telah dilepaskan kerana kegagalan bank melanjutkan tempoh kebolehsediaan jaminan bank. Pembelaan ini seharusnya gagal berasaskan kepada penemuan bahawa bank tidak mempunyai kewajipan untuk melanjutkan tempoh kebolehsediaan jaminan bank (lihat perenggan 29–32).

(5) Pembelaan defendan ketiga yang diplidkan adalah berasaskan kepada hujahan bahawa bank telah gagal menyediakan kemudahan jaminan bank. Ia tidak berasaskan kepada kegagalan penyerahan notis tuntutan. Walau bagaimanapun, adalah fakta yang dipersetujui di antara pihak-pihak bahawa bank melalui peguamcaranya menuntut di bawah

jaminan bahawa defendan-defendan kedua dan ketiga memperbaiki keingkaran defendan pertama. Dalam keadaan tersebut, hujahan bahawa oleh sebab notis tuntutan tidak diserahkan kepada penjamin dengan itu melepaskannya dari liabiliti, tidak boleh dipertimbangkan (lihat perenggan 33).]

Notes

For cases on facility agreement, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2818–2820.

Legislation referred to

Pengurusan Danaharta Nasional Berhad Act 1998 s 57

Thayakugan R (Md Tajuddin & Co) for the plaintiff in the original suit and for the first defendant in the counterclaim.
Norhafiza binti Mohd Said (RK Nandy, Norhafiza & Associates) for the first and second defendants in the original suit and for the plaintiff in the counterclaim.
Gurmit Singh (Fatimah Kei & Leong) for the third defendant in the original suit.
Nitin V Nadkarni (Lee Hishammuddin Allen & Gledhill) for the second and third defendants in the counterclaim.

Tengku Maimun J:

[1] BSN Merchant Bank Bhd, MBf Finance Bhd and Public Finance Bhd had agreed to grant to the first defendant a bank guarantee and a term loan under syndicated facilities agreement. In consideration of the first defendant executing the facility agreement, the second defendant and the third defendant executed a guarantee agreement dated 18 October 1996 to make payable monies and sum due and payable by the first defendant in the event of the first defendant's default.

[2] The facilities to be provided under the facility agreement consisted of:

(a) a bank guarantee amounting to RM45,000,000 to be provided by BSN Merchant Bank Bhd, MBf Finance and Public Finance to the first defendant; and

(b) a term loan amounting to RM8,000,000 to be provided by MBf Finance and Public Finance in the respective portions of one half to the first defendant;

[3] The availability period of the bank guarantee facility was for six months beginning 18 October 1996. The first defendant has failed to request for the issuance of the bank guarantee during the availability period and it expired on 18 April 1997. As for the term loan, it was agreed that it shall be repaid by 16

monthly installments of RM500,000 each after the date of first drawdown which drawdown of the entire term loan of RM8,000,000 was disbursed by BSN Merchant Bank Bhd on behalf of MBf Finance and Public Finance on 23 October 1996. Pursuant to the facility agreement the first installment on the principal sum became due on 23 October 1997. The first defendant breached the facility agreement by defaulting to pay the interest and installment and failed to settle the outstanding sums to date.

[4] By a vesting certificate issued pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998 ('the Act'), all the rights, title and interest of BSN Merchant Bank Bhd have been vested in Pengurusan Danaharta Nasional Bhd ('Danaharta'). Pursuant to a court order dated 14 July 2000, BSN Merchant Bank was substituted by Danaharta as the plaintiff. Pursuant to a vesting order dated 8 January 2001 all assets and liabilities of BSN Merchant Bank were transferred to Affin Bank.

[5] The land of the first defendant which was charged as security for the facilities was sold to Arena Flora Sdn Bhd for RM12,000,000. After deducting the costs and expenses in connection with the sale, the proceeds of the sale were credited into the first defendant's account. Vide this suit the plaintiff is claiming against the first defendant the outstanding sum plus interest. The claim against the second and the third defendants is under the guarantee agreement.

[6] The first defendant filed a counterclaim against the plaintiff, Affin Bank and BSN Merchant Bank for loss of profits, damages and expenses due to the failure to provide and make available the bank guarantee of RM45,000,000 to the first defendant.

THE EVIDENCE

[7] PW1 gave evidence that all the rights, title and interest relating to the facility given to the first defendant has been acquired by Danaharta and notice of the acquisition was given to the first defendant; that the first defendant made several proposals to restructure the loan but Danaharta was not able to accommodate as the proposals were not in compliance with the loan structuring guidelines; that Danaharta is not liable for the counterclaim as it was not a disclosed obligation. It was also the evidence of PW1 that the assets of Danaharta is now being managed by Prokhas Sdn Bhd.

[8] PW2 testified that notice was given to the first defendant on the failure to make payment and for the first defendant to remedy the breach, failing which the land will be sold pursuant to s 57 of the Act; that the sale was advertised and tenders were received; that the land was sold to Arena Flora Sdn Bhd for the

price of RM12,000,000; that notice of completion of sale was given to the first defendant vide a letter dated 16 May 2002; that RM11,740,569.76 has been credited into the account of the first defendant and the amount of RM259,430.24 was debited for expenses and costs incurred in connection with the sale.

[9] Through PW3 and PW4 evidence were led on the amount due and outstanding from the defendants. PW3 said that as at 31 March 2002 the amount outstanding from the defendants was RM1,920,573.08 and as at 31 March 2009 the amount owing was RM3,485,604.21. PW4 was the maker of the certificate of indebtedness (exh P7) showing the amount owing as RM3,485,604.21 as at 31 March 2009 with further interest.

[10] The first defendant and the second defendant did not give any evidence. Learned counsel for the first defendant and the second defendant also did not cross-examine the plaintiff's witnesses for want of instructions.

[11] The third defendant, ('DW1') gave evidence. There is no dispute that he signed the letter of guarantee. He admitted that he shall be jointly and severally liable not merely as a surety but as a principal debtor to pay on demand any monies declared to be due and payable under the facilities agreement in the event the first defendant fails to pay the same.

[12] DW1 further gave evidence that BSN has represented that the availability period of the bank guarantee will be extended and that BSN Merchant Bank has failed to provide any reasonable or sufficient notice to the defendants that the bank guarantee will lapse on 18 April 1997. However it was also his evidence that no representation was made to him and that he only knew about the representation from the second defendant. He also said that the bank guarantee of RM45m was for the sole purpose of financing the proposed construction and development project of the first defendant known as the 'Plaza Metropolitan'. He further said that since BSN has failed to release the said bank guarantee, he and the second defendant were released from the obligations of the said guarantee. DW1 also said that the plaintiff failed to disclose the fact that it holds security over the debt in the statement of claim and that they have sold the land to realise the debt.

[13] Mr Wong Meow Choy, also known as Jimmy Wong ('DW2') and Encik Zakaria bin Salleh ('DW3') gave evidence for Affin Bank and BSN Merchant Bank ('the banks'). DW2 was involved in arranging and managing the syndicated facilities given to the first defendant. His evidence was that the drawdown on the bank guarantee had to take place on or before 18 April 1997; that the first defendant wrote a letter dated 25 April 1997 to BSN Merchant requesting that the availability period for the bank guarantee facility be

extended until July 1997; that two meetings were held between the co-lenders and the first defendant; that Miss Fiona Ng accompanied him to the meetings; that Miss Fiona Ng did not have any meetings with the first defendant, the second defendant or the third defendant except in his presence; at these meetings the co-lenders made it very clear that the first defendant had to regularise the term loan facility before they could even consider renewing or restructuring the bank guarantee facility.

[14] It was further the evidence of DW2 that he did not make and could not have made any such statement that the availability period of the bank guarantee facility would be extended as it was not within his power to extend the bank guarantee facility; that the facility could only be extended with the consent of MBf Finance and Public Finance and neither of them agree to the extension. Further he testified that Miss Fiona Ng did not make any promise to extend the availability period of the bank guarantee facility in his presence and she had no authority to make such statement without his approval.

[15] DW3 who was involved in monitoring the repayment of the term loan facilities gave evidence on the various letters sent to the first defendant on the interest due on the term loan which has not been paid.

THE ISSUES

[16] The main issues to be determined are:

(a) whether the plaintiff and/or the banks are under an obligation to extend the availability period of the bank guarantee facility after 18 April 1997;

(b) whether the plaintiff and/or the banks are under an obligation to give notice to the first defendant that the bank guarantee facility will expire on 18 April 1997;

(c) if so whether the guarantors are discharged from their obligations under the guarantee agreement;

(d) whether there was any representation made by BSN Merchant that the bank guarantee facility will be extended;

(e) whether the banks have breached the terms of the facility agreement; and

(f) whether the first defendant has suffered any loss as a result of non-extension of the availability period of the bank guarantee facility.

FINDINGS

[17] At the end of the trial, parties requested for written submissions. The first and the second defendants had filed their written submission in court but

I wish to state that without leading any evidence at the trial, I do not find their submission useful in rebutting the plaintiff's case.

[18] Learned counsel for the third defendant argued that the plaintiff has no locus to bring this claim. He contended that the correct party to sue is Prokhas. I am in agreement with learned counsel for the plaintiff that Danaharta has the locus to bring this action against the defendants as Danaharta has acquired all the rights, title and interests of BSN Merchant Bank relating to the facilities and that there is no need for Prokhas, who was appointed to manage the assets of Danaharta pursuant to a management agreement dated 6 December 2005, to be substituted as the plaintiff.

[19] On whether there is any obligation on the plaintiff and the banks to extend the availability period of the BG facility, I agree with learned counsel for the banks that the terms of the facility agreement are clear. Section 1.1 of the facility agreement defines 'availability period' as 'the period commencing from the date hereof to the expiry of six months from the date hereof or such later date as may be mutually agreed between the Borrower and the Lenders subject always to the compliance of all legal documentations in respect of the Facilities as shall be required by the Agent on behalf of the Lenders and the compliance of all conditions precedent stipulated in this Agreement for the drawdown and availability of the Facilities'.

[20] There is no evidence that the first defendant and the lenders have mutually agreed to extend the availability period. What is in evidence is that the first defendant had requested for the period to be extended but the banks/lenders have not agreed to the same. MBf Finance vide a letter dated 30 June 1997 (exh D4) informed BSN Merchant Bank, inter alia, that 'we regret to inform that we cannot accommodate the borrower's request to extend the availability period in view of our existing commitments for guarantees in this sector'.

[21] Given the express provision in the facility agreement and the oral and documentary evidence, there is no basis to impose an obligation on the banks to extend the availability period of the bank guarantee after its expiry.

[22] The expiry date of the bank guarantee is already contained in the facility agreement signed by the second and the third defendants and the first defendant knew about it as evidenced from its letter seeking extension of the facility. Hence there is no need for the banks to give notice of the expiry of the bank guarantee facility. Further, there is no provision in the facility agreement requiring the banks to give such notice of the expiry of the bank guarantee to the first defendant.

[23] DW1 said that there was a representation made by BSN Merchant on the extension of the availability period of the bank guarantee. However, DW1 admitted that no representation was ever made to him by BSN Merchant and that he was informed of the representation by the second defendant who did not come to court to testify. Such evidence by DW1, as submitted by learned counsel for the banks, was clearly hearsay and had no probative value.

[24] The officers of BSN Merchant handling the facilities were DW2 and Miss Fiona Ng. Miss Fiona Ng was not in court to testify as she was in China, but DW2 who was her supervisor gave evidence that Miss Fiona Ng did not have any meetings with the first defendant in his absence and that she had not in his presence made any such representation to the first defendant. Further it was the evidence of DW2 that he did not have the authority to extend the availability period and he had not told the first defendant that the availability period would be extended.

[25] Further, if in fact there was a representation made on the extension of the availability period, it is reasonable to expect the first defendant to mention that fact in requesting for the extension. But that was not the case. The letter from the first defendant dated 25 April 1997 which was signed by the second defendant merely states:

> We have made several amendments toward the improvement and enhancement of the overall project. Our consultants have taken some time to finalise these amendments.
>
> In our revision exercise, we also had to liaise with the relevant authorities to seek their opinion and consent.
>
> In general, we feel that the loss of time was justifiable although it have moved our targeted date of the commencement of building works.
>
> We are pleased to advise that we are in the final stages of finalizing the tender for the above project.
>
> Your favourable consideration and early approval to our request for an extension of time till July 1997 is fully appreciated.

[26] The first defendant further wrote to BSN Merchant Bank on 22 May 1997 requesting for an extension of the bank guarantee until September 1997. Again, no mention was made on the alleged representation.

[27] I therefore find that that DW1 has failed to prove the representation on the extension of the availability period of the bank guarantee. Consequently I find that there is no breach committed by the banks under the facility agreement.

[28] As for the term loan, there can be no doubt from the evidence that the

first defendant had defaulted in repayment and the amount owing as at 31 March 2009 is RM3,485,604.21 (exh P7). There was no challenge by the first defendant and the second defendant on the evidence given by the plaintiff.

[29] As regards the third defendant, his defence is essentially that his obligation as a guarantor has been discharged due to the failure of the banks to extend the availability period of the bank guarantee. this defence must fail given the finding that the banks are under no obligation to extend the availability period of the bank guarantee.

[30] The issues raised by learned counsel for the third defendant in relation to the security held by the plaintiff, in my view is irrelevant by virtue of section 4.01 of the guarantee which provides that 'The Guarantors hereby jointly and severally agree that their liabilities to pay any amount due and owing by the Borrower under the Facility Agreement and the Security Documents should the Borrower fail to pay such amount when due is unconditional (except for the notice requiring payment set out in Section 3.03 hereof) regardless of the validity, regularity or enforceability of any obligation of the Borrower under the Facility Agreement and the Security Documents or any defect of any instrument or agreement entered into thereunder, informality or insufficiently in the borrowing powers of the Borrower or in the exercise thereof …'.

[31] Further section 7.01 of the guarantee states:'This Guarantee shall be in addition to and shall not in any way be prejudiced or affected by the collateral or other security now or hereafter held by the Lender … The Guarantors shall make no claim to such collateral or other security or any part thereof or any interest therein.'

[32] Learned counsel for the third defendant also submitted that the counterclaims were disclosed claim. This argument has no relevance to the third defendant given the fact that he is not a party to the counterclaim.

[33] For the third defendant, it was also submitted that no notice of demand was sent, hence absolving him of his liability as a guarantor. It must be emphasised that the pleaded defence of the third defendant was premised on the contention that the banks had failed to make available the bank guarantee Facility. It was not premised on the non-service of the notice of demand. In any event it was an agreed fact between the parties that vide a letter dated 29 December 1997 the banks through its solicitors had demanded under the guarantee that the second and third defendants make good the default of the first defendant. In the circumstances this point does not merit consideration.

[34] To conclude, it has been established that the first defendant had been granted the term loan facilities; that the second and the third defendants were

the guarantors; that the first defendant had defaulted in making repayments for the term loan; that demands were made to the defendants and that the security had been sold. The first defendant had been informed of the net sale proceeds (less expenses and costs incurred in connection with the said sale) which had been credited towards reducing the outstanding sums due from the first defendant. The first defendant was also notified that after crediting the said net sale proceeds, they were still indebted to the plaintiff for the shortfall in the amount of RM1,920,573.08. Given that the claim is for the shortfall, the non disclosure of the security in the statement of claim has not prejudiced the defendants in any way. Further, I do not find any manifest error in the certificate of indebtedness tendered by the plaintiff.

[35] I therefore find that the plaintiff has proved its claim on the balance of probabilities. Judgment is entered against the first, second and third defendants for the amount of RM3,485,604.21 with interest as prayed and costs. As for the counter claim, in the absence of any evidence led by the first defendant, the loss suffered by them has not been proven. The counterclaim has to be, and is dismissed with costs.

Plaintiff's claim allowed with costs; counterclaim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed